



Legal Update

January 24, 2014

The “overwhelming” odor of unburnt marijuana along with additional factors including an officer’s training and experience provided probable cause to believe a criminal quantity of marijuana may be hidden in the vehicle.

Commonwealth v. Yves Fontaine, Mass. Appeals Court, No. 12- P-1113 (2014)

Background: After observing the defendant, Yves Fontaine (hereinafter referred to as “Fontaine”) commit several traffic violations, Boston Police stopped Fontaine’s vehicle. As the police approached the vehicle, they observed Fontaine lean towards the passenger side compartment and sit right up. While the police were questioning Fontaine about his actions, they smelled an “overwhelming” odor of **unburnt** marijuana coming from inside the vehicle. The odor continued even though the driver and passenger windows were open. The police also observed a small quantity of marijuana packaged in a bag consistent with distribution. No other drug paraphernalia was found but the police were familiar with the passenger, Jason Bly (hereinafter referred to as “Bly”) from prior arrests for drug and firearm offenses. The police verified that Fontaine and Bly were convicted for drug offense in the past. The police did not administer any field sobriety tests to Fontaine because they did not suspect that Fontaine or Bly were impaired. Based on their initial observations, the police searched the vehicle’s front passenger compartment and recovered (3) separate bundles of United States currency totaling \$2,300 (in bundles of \$1,000, \$300, and \$1,000). One of the responding officers, Detective Sheehan, applied for a search warrant for the vehicle. In his affidavit, Detective Sheehan listed the purpose for the search but did expressly state how his training and experience qualified him in detecting the odor of unburnt marijuana.

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The search warrant was executed and police found a firearm and a magazine loaded with fifteen rounds of ammunition within a hidden compartment inside the vehicle. Fontaine was charged with firearms offenses and he filed a motion to suppress arguing that the odor of **unburnt** marijuana was insufficient for police to search the vehicle's glove compartment and order the occupants out of the vehicle. Fontaine maintained that a small quantity of marijuana in the center console, along with "the overwhelming odor" of **unburnt** marijuana, does not provide police with probable cause to believe that an additional amount of marijuana, drug paraphernalia, or a firearm would be located within a hidden compartment inside the vehicle.

Conclusion: The Court held there was sufficient evidence to issue a search warrant for a vehicle search and the discovery of the firearm during a vehicle search was proper and should not be suppressed.

As part of its analysis the Court examined how the Massachusetts marijuana decriminalization law, M. G. L. c. 94C, §§ 32L-32N, which became effective on December 4, 2008 impacted what police can do in the field based on the smell of burnt and unburnt marijuana. In *Cruz*, the Court established that the possession of a small quantity of marijuana (one ounce or less), without any evidence of criminal activity fails to support the search of a person, a backpack, or a vehicle for an additional quantity of marijuana. See *Commonwealth v Cruz*, 459 Mass. at 472 (2012). Similarly, the Court found in *Commonwealth v. Lobo*, 82 Mass. App. Ct. 803, 808 (2012) (police officer's detection of odor of "freshly burnt marijuana" following vehicle stop did not justify exit order in absence of other evidence of criminal activity). (2013) (search of vehicle was not permitted simply because operator produced two small bags of marijuana from her pocket); See *Commonwealth v. Daniel*, 464 Mass. 746, 751-752 (observation of person with marijuana cigarette does not create probable cause to believe person has possession of more than one ounce of marijuana); *Commonwealth v. Jackson*, 464 Mass. 758, 765-766 (2013) (trooper's detection of "strong odor of freshly burnt marijuana," statements by vehicle's occupants that they were smoking marijuana in car, and discovery in vehicle of small bag containing partial ounce of marijuana did not supply probable cause to search vehicle's trunk for evidence of distribution of marijuana). *Commonwealth v. Pacheco*, 464 Mass. 768, 772 (2013)

1st Issue: Is an "overwhelming" odor of unburnt marijuana sufficient to issue a search warrant?

The Court found that an "overwhelming" odor of unburnt marijuana coupled with additional factors provided probable cause to issue a search warrant for a vehicle. Detective Sheehan's nine year career with the Boston Police Department along with his specialized training from the Drug Enforcement Administration supported his suspicion that Fontaine may have used a hide in the vehicle to conceal drugs from the police. In his affidavit, Detective Sheehan reported that he had investigated drug distribution cases, prepared affidavits for search warrants, processed crime scenes and collected physical evidence. While an odor of unburnt marijuana alone may not suffice to search a vehicle, the Court found that "when an experienced officer detects an 'overwhelming' odor of unburnt marijuana that is 'pervasive' throughout the entire vehicle, and the officer reasonably believes it is inconsistent with the small quantity of marijuana that is visible in the vehicle, the officer has specific and articulable facts that support a reasonable suspicion that a crime is being committed, namely possession of more than one ounce of marijuana."

Second, "the discovery of the bundles of currency, the excess wiring under the dashboard, the manner in which the marijuana in the small bag in the console was packaged, the inconsistency between the strength of the
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odor and the amount in the small bag, and the fact that the two occupants had prior criminal convictions of drug offenses, was sufficient to establish probable cause to believe a criminal quantity of marijuana was hidden in the vehicle,” also contributed to Detective Sheehan’s suspicions that additional drugs may be found in the vehicle.

Based on all these factors, the Court concluded that an “overwhelming” odor of unburnt marijuana along these factors did provide probable cause to issue a search warrant. The Court failed to answer what the outcome would have been if the sole basis for the search warrant was an “overwhelming” odor of unburnt marijuana. However the Court included in its decision that “it is reasonable to conclude that an odor of unburnt marijuana, like “an odor of burnt marijuana no longer constitutes reasonable suspicion of criminal activity or probable cause without some additional fact or facts that establish a reasonable basis for the belief that more than one ounce of marijuana is in a person's possession or in the location from which the odor emanates.”

2nd Issue: Deficiencies with the Search Warrant

Fontaine argues that Detective Sheehan’s affidavit fails to state why his training and experience in detecting an odor of unburnt marijuana qualify him to offer an opinion as to whether additional drugs would be found in the vehicle. After reviewing the affidavit, the Court concluded that Detective Sheehan’s specialized training and the collective knowledge that his fellow officers were aware that drug dealers used secret hides in vehicles to prevent the police from discovering narcotics, money, and weapons, and he described both simple and sophisticated types of hides, the latter utilizing hydraulic arms and electronic relays. Detective Sheehan’s observation of "excess wiring throughout the dashboard and front passenger compartment," further supports his suspicion that the vehicle contained a hidden, electronic compartment or hide to conceal marijuana. Even though Detective Sheehan did not state how his training qualified him to detect an odor of unburnt marijuana, it did not impact the validity of the search warrant.

Fontaine also argued that the discovery of the firearm should be suppressed because the affidavit did not explicitly state a search for firearms or ammunition but focused on a search for drugs. The Court disagreed with Fontaine and found that there is a “common nexus between guns and drugs,” and that the police acted properly in applying for a search warrant for the defendant's vehicle because there were other factors to support that an excess of one ounce of marijuana would be found in the vehicle." *Commonwealth v. Reveron*, 75 Mass. App. Ct. 354, 358 (2009).

Commentary: This case serves as an excellent review of what the Court regards as sufficient evidence for searching a person, searching a vehicle or issuing an exit order when an officer smells burnt and unburnt marijuana. In this case the Court credited the training and experience of Detective Sheehan as a critical component of establishing reliability and probable cause for the issuance of the search warrant. As mentioned previously, Detective Sheehan had specialized training with narcotics arrests and he was assigned to units that investigated cases involving drug distribution and firearms.

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